Before Mr. Justice McDonell and Mr. Justice Beverley.

LOKE NATH SURMA AND OTHERS (PLAINTIFFS) *v.* KESHAB RAM DOSS AND OTHERS (DEFENDANTS).* 1886 *April* 19.

Multifariousness—Misjoinder of causes of action—Civil Procedure Code, 1882, *s.* 28—*Suit for declaratory decree—Specific Relief Act* (*I of* 1877), *s.* 42.

The plaintiffs having obtained a decree for the possession of certain lands and having received formal possession thereof, brought a suit against 86 persons holding distinct and separate tenures in those lands, on the allegations that, "on the plaintiffs attempting to measure the lands, and calling on the tenants to pay rent, ten of the defendants described as *prodhans* or headmen formed a combination and gained over the other defendants with a view to injure the plaintiffs; that through their help and endeavour the remaining defendants failed to recognize the plaintiffs as landlords, and declined to pay any rent or to allow them to measure the lands, driving away an Amin who went to measure the lands on behalf of the plaintiffs, and thereby preventing the plaintiffs from exercising their proprietary rights; that the plaintiffs brought suits for rent against some of the defendants, and in those suits the defendants denied the plaintiffs' title as landlords, whereupon the plaintiffs seeing the necessity of instituting a suit for declaring the defendants tenants of the land withdrew the suits for rent." They stated their cause of action to "be the defendants' act of not recognizing us as their landlord and thereby preventing us exercising our proprietary rights in respect of the land in suit, and not allowing us to make a measurement of that land, and also withholding the payment of rent"; and prayed for a decree establishing their proprietary right and declaring the defendants to be their tenants. *Held*, that there was but one and the same cause of action against all the defendants, *viz.*, a combination to keep the plaintiffs out of the enjoyment of the property they had purchased; and that the suit was not multifarious within s. 28 of the Civil Procedure Code. *Held*, also, that the declaratory decree prayed for could be made notwithstanding the plaintiffs might have asked for possession of the lands.

THE judgment appealed from in which the facts are fully stated was as follows:—

"The plaintiffs are the proprietors of two taluks—No. 5, Mahomed Nazim and No. 6, Mahomed Aufar. In the year 1877 they brought a suit against one Nasrat Raja, proprietor of taluk No. 3, for the recovery of certain lands claimed as appertaining

* Appeal from Appellate Decree No. 807 of 1885, against the decree of J. Kelleher, Esq., Judge of Sylhet, dated the 9th February 1885, reversing the decree of Baboo Ram Kumar Pal, Rai Bahadur, Subordinate Judge of that District, dated the 4th of July 1884.

Before Mr. Justice McDonell and Mr. Justice Beverley.

GOWRI PROSAD KUNDU AND OTHERS (PLAINTIFFS) *v.* RAM RATAN SIRCAR AND OTHERS (DEFENDANTS).* 1886 *April* 19.

Limitation Act, 1877, *Art.* 13—*Suit for refund of sale proceeds paid in accordance with order for distribution under s.* 295, *Civil Procedure Code*, 1882—*Multifariousness.*

In execution of a decree against six persons the plaintiffs had certain property brought to sale, the proceeds of which were brought into Court. The defendants, who held five separate decrees against some of the persons against whom the plaintiffs' decree was obtained, applied to have the amount in Court rateably distributed; and in accordance with an order of the Court, dated 13th September 1880, this was done, the proceeds being distributed in proportion to the amounts of the decrees. In a suit brought on 24th August 1883 against the defendants, on the allegation that the plaintiffs were entitled to the whole of the proceeds, or in the alternative for distribution on a different principle: *Held* the suit was one to set aside the order, and not having been brought within one year from the date of the order was barred by limitation under Art. 13, Sch. II of Act XV of 1877. *Ram Kishan* v. *Bhawani Das* (1) distinguished.

Held, also, that there was no misjoinder of causes of action by reason of all the defendants being included in one suit.

THE plaintiffs obtained a decree against six persons, in execution of which decree certain properties were sold, and a sum of Rs. 2,164 brought into Court as the proceeds of the sale. Meanwhile the defendants had obtained five separate decrees against some of the persons against whom the plaintiffs' decree was obtained, and applied to have the amount in Court rateably distributed between themselves and the plaintiffs. This was done by the Munsiff who, on 13th September 1880, ordered that Rs. 1,178 should be allotted to the plaintiffs, and the balance to the defendants in sums proportionate to the amounts of their decrees. The plaintiffs, on the 24th August 1883, brought the present suit against the defendants under the last clause of s. 295 of the Civil Procedure Code, alleging that they were entitled to

* Appeal from Appellate Decree No. 1844 of 1885, against the decree of C. B. Garrett, Esq., Judge of 24-Pergunnahs, dated the 26th of May 1885, affirming the decree of Baboo Krishna Chunder Chatterji, Subordinate Judge of that district, dated the 28th of June 1884.

(1) I. L. R., 1 All., 333.

1886

GOWRI PROSAD KUNDU v. RAM RATAN SIRCAR.

have the entire fund paid over to them. The plaintiffs asked for a decree for the amount received by the defendants, or, if the Court should be of opinion that the defendants were entitled to some share of the proceeds, that the distribution should be made with reference to the extent of the judgment-debtor's share.

The Subordinate Judge found that the suit was, if it was a suit to set aside the order passed under s. 295, barred by limitation, or if not, it was bad for misjoinder of causes of action.

The Judge on appeal held on the authority of *Ram Kishan* v. *Bhawani Dass* (1), that the suit was not one to set aside the order under s. 295, and was not barred by limitation; but that it was bad for misjoinder. He, therefore, dismissed the appeal.

The plaintiffs appealed to the High Court.

Baboo *Girja Sunker Moozoomdar* and Baboo *Guru Dass Banerjee* for the appellants.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Rash Behary Ghose* for the respondents.

The judgment of the Court (McDONELL and BEVERLEY, JJ.) after stating the facts, continued as follows:—

On appeal the Additional Judge held that the suit was not barred by limitation, but that it was bad on the second ground.

Against this latter finding, the plaintiffs have preferred a second appeal, and the respondents seek to uphold the decree of the lower Appellate Court on the ground of limitation. It is contended that they are not at liberty to do this, not having given notice to the other side under the provisions of s. 561 of the Code; but we think that, under the terms of that section, it was not necessary to give the appellants notice.

The Judge has disposed of the question of limitation relying on the authority of the case of *Ram Kishan* v. *Bhawani Dass* (1); but the circumstances of that case were different

(1) I. L. R., 1 All, 333.

from those of the present, and the decision is, therefore, not applicable. In that case it was held that a suit to recover the sale proceeds paid away under an order of the Judge, which was made without jurisdiction, was not a suit to set aside that order, inasmuch as the order itself was a nullity. But in the present case the order of distribution was made by a Court fully competent to make it, and was a good order until set aside.

Moreover, it is not easy to see how any relief could be granted to the plaintiffs without setting aside that order, and in fact the plaintiffs virtually ask to have it set aside, because they ask as an alternative prayer in their plaint that, if they are found to be not entitled to the whole of the assets, those assets may be distributed on a principle different from that adopted by the Munsiff.

We have been referred to two cases decided under Act VIII of 1859—*Gogaram* v. *Kartick Chunder Singh* (1) and *Woomamoyee Burmonya* v. *Ram Buksh Chetlangee* (2), which decided that a suit brought to obtain a refund of sale proceeds paid away by the Court in contravention of the provisions of s. 270 of that Code must be regarded as a suit to set aside the order of the Court. The fourth clause of s. 295 of the present Code runs as follows :—

"If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such persons to compel him to refund the assets."

Assuming that such a suit may be brought by one of the parties to the distribution as effected by the order of Court, we think it must be regarded as a suit brought by him to set aside that order, and therefore it must be brought within one year from the date of the order. The present suit not having been instituted within that period, we are of opinion that it is barred by limitation under Art. 13, Sch. II, of the Limitation Act.

On the other point we are clearly of opinion that the suit should not have been thrown out for misjoinder of parties. In

(1) B. L. R., Sup. Vol., 1022 ; 9 W R., 514.
(2) 16 W. R., 11.

1886

GOURI PROSAD KUNDU v. RAM RATAN SIRCAR.

the case of *Brojo Nath Chuckerbutty* v. *Baney Madhub Dischit* (1), it was held that, in a suit, brought to set aside an order under s. 270 of Act VIII of 1859, all the parties to the distribution ought to be made parties to the suit. We find that a similar view was expressed in a recent decision by a Divisional Bench of this Court in Appeal from Original Decree 291 of 1884, decided on 8th September 1885, in respect of suits under s. 295 of the present Code. In this case, it was absolutely necessary that the Court should have before it all the parties to the distribution if it was to decide whether that distribution had been effected upon a proper principle.

Moreover, under ss. 28, 31 and 45 of the Code, it would seem that the suit should not have been dismissed on this ground. As we have held, however, that the suit is barred by limitation, the appeal is dismissed with costs.

J. V. W. *Appeal dismissed.*

Before Mr. Justice Ghose and Mr. Justice Grant.

AHMED MIRZA SAHEB AND ANOTHER (PLAINTIFFS) *v.* A. THOMAS, EXECUTOR TO THE ESTATE OF THE LATE MR. J. P. WISE AND OTHERS (DEFENDANTS).*

1886 *May* 27.

Court Fees Act (VII of 1870), *Sch. I and Sch. II, Art.* 7, *cl.* 3—*Suit after rejection of claim to attached property—Ad valorem Stamp.*

In execution of a decree by the defendant, certain property was attached as being that of the judgment-debtor. The plaintiff preferred a claim, but his claim was disallowed, and the property ordered to be sold. In a suit to have it declared that the property belonged to the plaintiff: *Held* it was a suit in which consequential relief was asked for, and that the *ad valorem* duty prescribed by Schedule I of the Court Fees Act was payable on the plaint, and not that provided by Schedule II, Art. 17.

Jalaluddin Mahomed v. *Shohorullah* (2) followed.

IN execution of a decree obtained by the defendants against the plaintiffs' father Mahomed Mirza, certain properties were attached, to a share of which the plaintiffs alleged they were

* Appeal from Appellate Decree No. 2533 of 1885, against the decree of J. F. Bradbury, Esq., Judge of Backergunge, dated the 3rd of September 1885, affirming the decree of Baboo Beni Madhub Mitter, First Subordinate Judge of that district, dated the 24th of April 1885.

(1) 23 W. R., 434. (2) 15 B. L. R., Ap. 1 ; 22 W. R., 422.

Before Mr. Justice Porter and Mr. Justice Agnew.

TORAB ALI KHAN AND OTHERS (TWO OF THE DEFENDANTS) *v.* NILRUTTUN LAL AND OTHERS (PLAINTIFFS.)[o]

1886 *May* 15.

Limitation Act (XV of 1877), Sch. II, Arts. 61, 115, 120—Money which plaintiff was obliged to pay in consequence of acts of defendants.

On the 29th May 1873 one *T.* drew from the hands of a shroff a sum of money which had been deposited by him in the name and to the credit of a third person. On the death of such third person his heirs sued the shroff to recover the sum deposited, and on the 30th January 1878 obtained a decree, in satisfaction of which the shroff paid the decretal money into Court on the 15th January 1883. On the 5th February 1884 the shroff sued *T*, the heirs of the third party and another person (who owned to having received some of the money from *T*), to recover the sum he had been compelled to pay under the decree of 1878.

Held, that the plaintiff's cause of action arose at the time when he actually paid down the money on the 15th January 1883, and that the suit therefore was not barred by limitation.

ON the 26th January 1871 one Torab Ali Khan deposited a sum of Rs. 1,329 with the firm of Nilruttun and Co. to the credit of the account of one Asgar Hossain, receiving from the firm a receipt for that sum. On the 20th July 1871 one Chuni Lal (a servant of one Mussamut Bhikhan, an aunt of Asgar Hossain) presented the receipt to the firm of Nilruttun and Co. and received payment of Rs. 200, which payment was endorsed upon the receipt, and was also entered in the books of the firm. Subsequently further payments were made personally to Chuni Lal on production of the receipt, and on the 29th May 1873 Torab Ali Khan himself produced the receipt to the firm and drew out the balance of the money, with the interest-due thereon, and returned the receipt.

Subsequently to the death of Asgar Hossein, his widow, sons and daughters brought a suit against the firm of Nilruttun and Co. to recover the sum deposited in the name of their father; and on the 31st January 1878 obtained in such suit a decree.

[o] Appeal from Order No. 327 of 1885, against the order of T. Smith, Esq., Judge of Gya, dated the 7th of September 1885, reversing the decree of Baboo Dinesh Chunder Roy, Subordinate Judge of that district, dated the 20th November 1884.

1886

TORAB ALI KHAN v. NILRUTTUN LAL.

On execution of this decree issuing, some of the judgment-creditors, *viz.*, the widow and sons of Asgar Hossein, voluntarily gave up their portions of the sum ordered to be paid under the decree, but as regarded the share in the decree belonging to the daughters (who were minors) execution was taken out and the sum due was deposited in Court by Nilruttun and Co. on the 15th January 1883.

Nilruttun and Co. then demanded from Torab Ali Khan the sum which he had received from them, and he admitted that he had made it over to Mussamut Bhikhan, who also refused to repay the amount she had received. Thereupon Nilruttun and Co., on the 5th February 1884, brought a suit against Torab Ali Khan, Mussamut Bhikhan and the minor daughters of Asgar Hossein, the minors being represented by their elder brother as guardian, to recover the sum paid by him on their account, dating their cause of action from the 15th January 1883.

Torab Ali pleaded limitation, and contended that, inasmuch as he was not a party to the suit in which the decree of the 30th January 1878 was obtained, he could not be made liable in this suit.

Mussamut Bhikhan pleaded limitation, and contended that she was not a necessary party to the suit.

The minors put in no written statement.

The Subordinate Judge found that, when Torab Ali received the money, he impliedly, if not expressly, promised the plaintiffs to pay the money to the persons entitled thereto without delay; and that inasmuch as he had not done so, he as well as the persons to whom he paid the money had acted fraudulently towards the plaintiffs, and that the plaintiffs' cause of action against them arose as soon as the fraud was discovered, which was, when the decree in the first suit was obtained, *viz.*, the 30th January 1878, he, therefore, held that the suit was barred by Art. 115 of the Limitation Act, even allowing that the plaintiffs were entitled under Art. 95 to extend the period of limitation so as to allow time to run from the time that the fraud became known to the plaintiffs.

The plaintiffs appealed to the District Judge, who held that the breach of the contract by Torab Ali was a continuing

breach, and that, therefore, on the authority of *Imdad Ali* v. *Nijabat Ali* (1) the suit was not barred.

The defendants appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Moulvi *Mohamed Yusuf* for the appellants contended that there being no contract, the suit did not fall under Art. 115 of the Limitation Act; but that it would either fall under Art. 96 or 120; and relied upon the case of *Raghumoni Audhikary* v. *Nilmoni Singh Deo* (2)

Mr. *W. M. Das* and Baboo *Rash Behari Ghose* for the respondents were not called upon.

The judgment of the Court (PORTER and AGNEW, JJ.) was as follows:—

The plaintiffs' case is that, on the 26th of January 1871, the defendant Torab Ali opened a banking account with their firm in the name of one Asgar Hossein; that on the 29th of May 1873, Torab Ali drew out the amount of the balance at the credit of Asgar Ali, and made it over to the defendant Mussamut Bhikhan; and that, on the 30th of January 1878, a decree was made against the plaintiffs for the refund of this amount at the suit of the heirs of Asgar Hossein. The plaintiffs further state that some of the heirs executed a release to them for the amount of their shares, and that they were obliged to pay the sum of Rs. 930-0-6 to the other heirs on the 15th of January 1883. They now sue for this sum and for Rs. 125-15-6 for interest. The suit was instituted on the 5th of February 1884, the plaintiffs alleging that their cause of action accrued on the day when they had to pay the sum of Rs. 930-0-6. The first Court held that the suit was governed by Art. 115 of the second Schedule to the Limitation Act, and that it was barred, having been instituted more than three years from the date when the fraud was discovered. This decision was reversed on appeal, the Judge holding that the defendant Torab Ali's breach of an implied contract, which was the cause of action, was a continuing breach, and that the suit was not barred. It has been argued for the appellant that

(1) I. L. R., 6 All., 457. (2) I. L. R., 2 Calc., 393.

1886

TORAB ALI KHAN v. NILRUTTUN LAL.

either Arts. 95, 96, or 120 of the second Schedule to the Limitation Act apply to the case, and that the cause of action accrued either on the 29th of May 1873 when Torab Ali drew the balance, or, if not then, on the date when the plaintiffs first became aware of the alleged fraud, and in either case more than six years before the suit was instituted. There does not appear to be any article which applies precisely to this case; the article which appears most applicable is, we think, Art. 61, which provides, a period of three years' limitation from the date when the money is paid, for a suit to recover money payable to the plaintiffs for money paid for the defendant. We do not think that either Art. 95 or Art. 96 apply. The suit is not to obtain relief on the ground of fraud or mistake but to recover a specified sum of money which the plaintiffs have had to pay in consequence of the act of the defendant, Torab Ali. Until that money was paid, the plaintiffs did not suffer any loss. The mere demand by the heirs of Asgar Hossein did not give the plaintiffs a cause of action against the defendants, nor did the institution of the suit. The demand might have been abandoned, or the suit might have been dismissed. And even supposing that the plaintiffs had admitted their liability to the heirs, they would not have suffered any loss until they actually paid the amount claimed; and that is shown by what actually happened in this case when some of the heirs released the plaintiffs from their claims. The plaintiffs do not pretend to say that they are entitled to recover more than what they actually had to pay. We think, therefore, that the cause of action accrued on the 15th of January 1883, the date when the money sued for was paid, and that the suit is not barred by limitation, and we dismiss the appeal with costs.

T. A. P. *Appeal dismissed.*

1886

LOKE NATH SURMA v. KESHAB RAM DOSS.

to taluks Nos. 5 and 6, and alleged to be held by the defendant. That suit was decreed by the Subordinate Judge on the 21st June 1877, and it is said formal possession was delivered to the plaintiffs in execution by a Civil Court Amin deputed for the purpose. The plaintiffs now, specifying the boundaries of certain lands aggregating a total area of 65 hals 10 kears, bring the present suit against the tenants of those lands, 86 in number, on the following allegations:—

"(1.) That the lands in the possession of the defendants were included in those delivered in execution of the decree against Nasrat Raja; that defendants or their predecessors were at that time in possession as the tenants of Nasrat Raja, and were all aware of the proceedings in execution of the plaintiffs' decree.

"(2.) That in Pous 1285 B.S., December (1878), plaintiffs attempted to measure the lands in suit, and called on the jotedars (tenants) to pay the rents of those lands; but ten of the defendants, who are described as *prodhans* or headmen, formed a combination, and gained over the other defendants with a view to injure the plaintiffs; and then through their help and endeavour the remaining defendants failed to recognise plaintiffs as their landlords, and declined to pay any rent or to allow the plaintiffs to make the measurement. It is further alleged that they drove away an Amin who went to measure on behalf of the plaintiffs, and thereby prevented plaintiffs from exercising proprietary rights in respect of the lands and suspended plaintiffs' possession.

"(3.) The plaint then proceeds to state that plaintiffs brought several rent suits against the defendants or some of them in the Munsiff's Court; but that in those suits the defendants denied plaintiffs' right by raising the question of title. Whereupon plaintiffs, seeing the necessity of instituting a civil suit for declaring the defendants' tenants of the land, withdrew the rent suits mentioned.

"In paragraph 5 of the plaint the cause of action is stated as follows: "The defendants' act of not recognising us as their landlords, and thereby preventing us to exercise our proprietary right in respect of the land in suit, and not allowing us to make a measurement of that land and also withholding the payment of rent."

1886

LOKE NATH SURMA v. KESHAB RAM DOSS.

"The plaintiffs, therefore, 'pray for a decree establishing the proprietary right of the plaintiffs in respect of 65 hals 10 kears 1 powa of land being under the jote and possession of the defendants, and declaring the defendants as tenants under the plaintiffs, so that the plaintiffs may be enabled to exercise all sorts of proprietary rights in respect of the said property against the defendants,' or for such other relief as the Court should think fit.

"Five of the defendants appeared and objected to the suit on the grounds (1) that it was untenable under the provisions of Act I of 1877; (2) that it was barred by limitation; (3) that it was bad because different causes of action against different defendants separately were joined in a single suit; and (4) that it was bad for non-joinder of parties, because certain persons, alleged to be the actual landlords and in possession and receipt of rent from the defendants, were not made parties. Into the other defences set up it is unnecessary to go more into detail. Defendants denied that the lands held by them were ever included in the suit between plaintiffs and Nasrat Raja, or that they (the defendants) ever paid any rent to Nasrat Raja. They allege that the lands in their tenancy really appertained to taluk No. 2, Korban Raja, that they were themselves owners to the extent of 10 annas, having purchased an 8-anna share from one Ammal Khair Bibi, and a 2-anna share from one Kala Chand Roy; that as regards the remaining 6-annas, they were tenants and paid their rents to the proprietors, who ought to have been joined as parties to the suit.

"At the trial before the Subordinate Judge, a copy of the decree in plaintiffs' case against Nasrat Raja was admitted in evidence against the defendants. Four of the witnesses examined for Nasrat Raja in that suit happened to be included amongst the defendants in the present suit, but they did not appear. However, copies of their depositions in Nasrat Raja's suit were admitted in this suit as evidence, not only against the four defendants themselves, but against the remaining 82 defendants on the record, and his judgment was in a great measure influenced by the former decree and the admissions contained in those depositions. I may here note that the tenancies of the 86 defendants are altogether distinct and separate. It will be observed that, in deciding the sixth issue, the Subordinate Judge relied mainly

1886

LOKE NATH SURMA v. KESHAB RAM DOSS.

on the admissions contained in the depositions above-mentioned. "Those persons," he adds, "have not been bold enough to make a reply in the present suit, inasmuch as they bound themselves by giving their depositions in the previous suit; but it has been proved by the evidence adduced in this suit that they are in a combination with the defendants who appeared in this suit, and the circumstances of the suit also go to support that," and so of course any admissions made by the witnesses as to their own tenancies became at once evidence with respect to the remaining 82 tenancies. Again in his decision on the seventh issue, the Subordinate Judge refers to those documents and to the admissions contained in the depositions of the four persons examined as witnesses in Nasrat Raja's case.

"In the result the suit was decreed in favour of the plaintiffs, and it was ordered that "the plaintiffs' title to, and possession of, the land in suit be established, and it be declared that the defendants are the plaintiffs' jotedars in respect of that land," and the defendants who appeared were ordered to pay the plaintiffs' costs.

"The objections taken in appeal are substantially the same which were urged before the lower Court. It is contended that the suit is one for which no sanction is to be found in the Procedure Code, and that it is expressly excluded by the provisions of s. 28; that the plaintiffs being able to seek further relief than a mere declaration of title, and having omitted so to do, cannot have a declaration under s. 42 of the Specific Relief Act; that the suit was bad for nonjoinder of the proprietors of the 6-anna share; that it was barred by limitation; that the decree in Nasrat Raja's case and the depositions of the witnesses already mentioned were not admissible in evidence at the trial of this suit, and that in no way could the admissions in those depositions be made evidence against the other defendants to the suit. It was also contended that, if plaintiffs were resisted in their measurement, they had a special remedy provided for them by s. 38, Beng. Act VIII of 1869.

"On the merits of the question of title, the case was argued at length with reference to maps and boundaries and the oral evidence bearing on those points.

1886

LOKE NATH SURMA v. KESHAB RAM DOSS.

"Under s. 28 of the Procedure Code, only those persons may be joined as defendants against whom the right to any relief is alleged to exist "in respect of the same matter." In the course of the argument I asked plaintiffs' pleader how the relief against the several defendants could be said to exist in respect of the same matter, and his reply was: "When I sent my own men to measure the lands, they resisted and denied my right to measure and thereby my proprietary right." When the plaintiffs are driven to resort to a mere fiction of that sort as a ground of jurisdiction, their case must be very weak. The plain facts are that there are 86 tenants of distinct and separate lands who refuse to pay rent to the plaintiffs, have never paid them any, and deny their title to recover any such rents. The case of each particular defendant is entirely distinct and separate in its subject-matter from that of the other defendants. The provisions of the Procedure Code bearing on this question will be found dicussed in a Full Bench decision of the Allahabad High Court—*Narsing Das* v. *Mangal Dabi* (1), and it is unnecessary for me to say more on the subject. I hold that this suit ought to have been dismissed, because different causes of action against different defendants separately were joined, for which procedure no sanction is to be found in the Code.

"Even if that objection were not fatal to the suit, I should be prepared to hold that a declaration of the nature prayed for, without further relief sought, could not be made under s. 42 of the Specific Relief Act.

"In the above view of the case it is unnecessary to go into the other questions raised by the appeals. It is to the advantage of the parties themselves that the questions at issue between them should be left for decision on legal evidence in suits properly framed for the purpose.

"The decree of the lower Court will accordingly be reversed with costs of both Courts and interest at 6 per cent. per annum."

From this decision the plaintiffs' appealed.

Mr. *Woodroffe* and Baboo *Joygobind Shome* for the appellants.

Munshi *Serajul Islam* for the respondents.

(1) I. L. R., 5 All., 163.

1886

LOKE NATH SURMA v. KESHAB RAM DOSS.

The judgment of the Court (McDONELL and BEVERLEY, JJ.) was as follows :—

The circumstances of this case are fully set out in the decision of the lower Appellate Court.

It is contended in second appeal that the District Judge is wrong in law: (1) in dismissing the suit on the ground that different causes of action against different defendants separately have been joined together; and (2) in holding that a suit for a mere declaration of title without further relief is not maintainable under s. 42 of the Specific Relief Act.

In deciding the first point, the Judge has relied upon the Full Bench decision of the Allahabad High Court in the case of *Narsing Das* v. *Mangal Dabi* (1), in which it was held that, where several distinct causes of action are alleged against distinct acts of defendants who are not jointly liable in respect of each and all of such causes of action, a suit against all the defendants jointly is bad in law.

In the present case, however, it is contended that the cause of action alleged against all the defendants is one and the same, *viz.*, a conspiracy on the part of all the defendants to keep the plaintiffs out of possession of their property; and we have been referred to the case of *Gajadhur Pershad Narain Singh* v. *Saheb Roy* (2), where a number of ryots were held to have been properly sued in one and the same suit, on the allegation that they had fraudulently used a forged *jamabandi* paper with the view to support certain *mokurari* claims which they put forward, and thereby to oust the plaintiff from the full enjoyment of his proprietary right.

In the present case, the cause of action is said to have accrued in consequence of the defendants not admitting the plaintiffs to be their landlords, not allowing them to exercise their *maliki* rights to the disputed lands, not paying them the rents, and not allowing them to measure the lands (see para. 5 of the plaint). And this cause of action is said to have arisen on the dates on which the written statements were filed in the rent suits which the plaintiffs brought against some of the defendants.

(1) I. L. R., 5 All., 163. (2) 19 W. R., 203.

1886

LOKE NATH SURMA v. KESHAB RAM DOSS.

The allegation in the plaint is that some of the defendants *and the predecessors of others* combined to prevent the plaintiffs from measuring the lands, and further that some of the defendants, who were sued for rent, put in answers denying the plaintiffs' title.

These statements are somewhat vague, and do at first sight give rise to the impression that several distinct causes of action against different sets of defendants are being joined in one and the same suit; but on the whole of the pleadings, we think it must be taken that there was really but one and the same cause of action against all the defendants, *viz.*, a combination to keep the plaintiffs out of the enjoyment of the property which they had purchased.

Only 5 out of the 86 defendants appeared, and their defence was that they had a *maliki* right to a 10-anna share of the lands in suit. This defence was apparently put forward on behalf of the other defendants as well as themselves, though it was at the same time alleged that some of the defendants were acting in collusion with the plaintiffs. The District Judge says:—

"The plain facts are that there are 86 tenants of distinct and separate lands who refuse to pay rent to the plaintiffs, have never paid them any, and deny their title to recover any such rents." But the mere fact that these tenants hold distinct and separate lands affords no sufficient reason why they should not be joined as co-defendants in the same suit, if, as the Judge finds as a fact, they have combined to keep the plaintiffs out of possession.

Section 28 of the Code allows all persons to be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or, in the alternative, in respect of the same matter. In the present suit, it is alleged that the right to a declaration of the plaintiffs' title exists against *all* the defendants, inasmuch as they all deny the plaintiffs' right to receive the rents of the land in dispute.

The section in question goes on to say that "judgment may be given against such one or more of the defendants as may be found liable, according to their respective liabilities without any amendment" of the plaint. And s. 31 of the Code provides

1886

LOKE NATH SURMA v. KESHAB RAM DOSS.

that "no suit shall be defeated by reason of the misjoinder of parties," but that "the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

By s. 45 a plaintiff is allowed, subject to certain conditions, to join several causes of action against the same defendant, or the same defendants jointly; and if it appears that such causes of action cannot conveniently be tried together, the Court is not to dismiss the entire suit but to order separate trials thereof, or make such other order as may be necessary or expedient for their separate disposal.

We think then that, under the circumstances of the case, this suit ought not to have been dismissed on the ground of misjoinder. In this view we are supported by the decision in *Omur Ali* v. *Weylayet Ali* (1).

Nor in our opinion was the suit liable to be dismissed on the ground that the declaration prayed for could not be made under s. 42 of the Specific Relief Act.

It is contended that the plaintiffs, being out of possession, should have sued to recover possession, and not merely have sued for a declaration of their title. We think that this was unnecessary. The plaintiffs were not seeking for khas possession, but merely for possession by receipt of rent from the defendants. Under these circumstances, even if the plaintiffs had sued for and obtained a decree for possession of the property, that possession could only have been delivered by notifying the declaration of the plaintiffs' title as prayed for. We think, therefore, that the omission to sue for possession was immaterial, and that the suit was not liable to be dismissed on this ground.

Under these circumstances we reverse the decree of the lower Appellate Court and remand the case to that Court under s. 562 of the Code for trial of the appeal on its merits.

J. V. W. *Appeal allowed and case remanded.*

(1) 4 C. L. R., 455.